



---

# it takes two to make a rule go right (?): nlrp unveils new joint employer test

---

Jonathan Turner & Eric Engelman  
*MSK Client Alert*

October 31, 2023

## **The New NLRB Joint Employer Test**

The National Labor Relations Board (“NLRB”) recently unveiled a final rule creating a new joint employer test under the National Labor Relations Act (“NLRA”). The new rule creates a lower threshold to make it easier for two or more employers to be considered “joint employers” under the NLRA. This is the latest instance of the NLRB’s efforts to reverse many of the NLRB decisions that were made during the prior administration, when the majority of the members of the NLRB, as well as its General Counsel, were Republican appointees with leanings towards the business community.

The new rule is a return to the rule that was in place during the Obama administration, except that this labor-friendly rule now is codified under NLRB regulations, making it more difficult to reverse should a subsequent administration change the makeup of the members of the NLRB so that the agency again leans towards a more business friendly environment. Under the new rule, two or more employers may be considered a joint employer if the entity “possesses the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees’ essential terms and conditions of employment.” Critically, this new rule expands the reach of joint employer status to situations where the employer has the contractual authority to control essential employment terms even if it does not directly exercise that authority.

The final rule, which goes into effect on December 26, 2023, replaces the 2020 version of the rule that instead was more narrowly focused on “direct and immediate control.” The final rule also provides that when an employer is determined to have control over one or more “essential” terms or conditions of employment, thereby acquiring the status of a joint employer, it then is obligated to engage in collective bargaining with employees over all of the terms and conditions of employment that it controls or has authority to control,

## **attorneys**

Eric D. Engelman  
Jonathan M. Turner

## **practice areas**

labor & employment



## it takes two to make a rule go right (?): nlrh unveils new joint employer test

---

regardless of whether any of those other terms or conditions also were "essential" in determining joint employer status.

### **Effect on Employers**

A finding that an entity is a joint employer can have a significant impact on a company. In addition to potentially being required to engage in collective bargaining, a company could be liable for unfair labor practices committed by the other employer, or be subject to picketing that would otherwise violate the NLRA.

Given the possible ramifications of being designated a joint employer, companies may want to review their contracts with subcontractors and other businesses to evaluate whether they contain terms that can be viewed as creating a joint employer relationship under the new test. Employers who have other vendors, subcontractors, or staffing agencies work on their premises may also consider reviewing any rules, policies, or practices that could be interpreted as giving such entities the authority to directly or indirectly control the other's employees.